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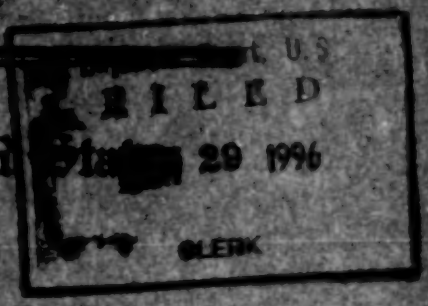

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

UNITED STATES OF AMERICA,
Petitioner,
v.
WINSTAR CORPORATION, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether a contract with the United States, valid when entered, may be abrogated by a change in the law.

2. Whether and to what extent compensation is due to a party whose contract with the United States is unilaterally voided by the United States.

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America ("the Chamber") is the largest association of businesses, companies and associations in the world. With substantial membership in each of the fifty states, the Chamber represents more than 220,000 companies, trade and professional associations, and state and local Chambers of Commerce. It is the principal voice of the American business community. An important function of the Chamber is to represent the interests of its members in critical issues before the Supreme Court. The Chamber seeks to

advance those interests by filing briefs in cases of importance to the business community.

Many of the Chamber's members contract with agencies of the United States government. Thus, the primary issue presented here is of great concern to all Chamber members. These members take issue with the government's position that Congress may unilaterally and retroactively abrogate valid contracts between private parties and the United States without compensation. The government's view of its contractual obligations would permit the United States to receive the benefits of its bargains, and then refuse to pay, making the contracts illusory. The Chamber believes it is important for the Court to recognize the significance of this issue to the business community.[1]

STATEMENT OF THE CASE

Stripped to its essence, this case is about whether the government can abrogate a key payment term in a contract that has been performed by the other contracting party and, on that basis, refuse to pay. Under a congressionally authorized program enacted to address the savings and loan crisis, Respondents, healthy thrifts at the time, agreed to acquire failing thrifts that otherwise would have cost the government hundreds of millions of dollars in federal funds. Part of the consideration promised by the government for Respondents' assumption of these government liabilities included an agreed value for supervisory goodwill to be amortized over an agreed term.

After formation of the contracts at issue, Congress passed the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183, which, among other things, limited the value of supervisory goodwill. Based on FIRREA, the

[1] Respondents and the United States have consented to the filing of this brief. Their respective letters of consent are filed herewith.

government attempted to modify unilaterally its contracts with the thrifts. The issue before the Court is whether a contract between an executive agency and a private party that was valid when entered can be voided by a subsequent act of Congress.

SUMMARY OF ARGUMENT

1. The Chamber's *amicus curiae* brief does not address whether in each of the individual situations at issue a contract was formed between Respondents and the Federal Savings and Loan Insurance Corporation ("FSLIC") and the Federal Home Loan Bank Board ("FHLBB"). Instead, the Chamber's brief establishes that:

(a) FSLIC and FHLBB had authority to enter into these contracts at the time of the agreements;

(b) once they exercised that authority, FSLIC and FHLBB created valid contract rights;

(c) those rights could not be voided by a subsequent act of Congress; and

(d) the government can avoid its obligation to perform only by the payment of breach of contract damages, just compensation under the Fifth and Fourteenth Amendments, or restitution.

2. Neither the unmistakability doctrine nor the sovereign act doctrine modifies this result. A contract need not waive the government's right to legislate in unmistakable terms in order to preserve a right to compensation for valid contract rights destroyed by legislation. Instead, if the government wants to limit its damages for non-performance, the government must expressly reserve the right to modify its contracts if circumstances change. Absent such express reservation, government non-performance, even if in response to legislation, subjects the government to liability for breach of contract or frustration of purpose. Alternatively, the government may be required to pay compensa-

tion under the Takings Clause of the Fifth Amendment or the Public Debt Clause of the Fourteenth Amendment.

ARGUMENT

I. RESPONDENTS POSSESSED VALID CONTRACT RIGHTS BEFORE AND AFTER THE ENACTMENT OF FIRREA

A. Respondents Entered Into Valid Contracts

The validity of all contracts to which the government is a party is dependent on a determination that the government agent whose conduct is relied upon to establish a contractual relationship possessed actual authority to bind the government. *Federal Crop Ins. Corp. v. Merrill,* 332 U.S. 380, 383 (1947); *City of El Centro v. United States,* 922 F.2d 816, 820 (Fed. Cir. 1990), *cert. denied,* 501 U.S. 1230 (1991). The United States Congress establishes the boundaries within which an agency can enter into contracts. As long as the agency acts within that authority, such contracts are valid and enforceable against the United States. *Merrill,* 332 U.S. at 383.

Prior to the enactment of FIRREA, FSLIC and FHLBB possessed the authority to bind the government in contract. *See, e.g.,* 12 U.S.C. § 1725(c)(3) (1988) (repealed 1989) (FSLIC and FHLBB had power "to make contracts"); 12 U.S.C. § 1729(f)(2)(A) (repealed 1989) (FSLIC and FHLBB possessed authority to extend assistance to acquirers of insolvent FSLIC-insured thrifts); 12 U.S.C. § 1730(t)(2) (repealed 1989) (FSLIC and FHLBB could set minimum capital requirements on case-by-case basis). Accordingly, FSLIC's contracting authority was sufficiently broad and discretionary to enable FSLIC to enter agreements regarding the valuation of goodwill.

B. Valid Contract Rights Survive Subsequent Legislation That Alters A Contracting Agency's Authority

Authority is determined at the time a contract is entered. Courts have long held that the regulatory environment in effect at the time of contracting determines the contractual rights of the parties. *See Merrill,* 332 U.S. at 384-85; *Larionoff v. United States,* 533 F.2d 1167, 1179-80 & n.35 (D.C. Cir. 1976), *aff'd,* 431 U.S. 864 (1977); *see also Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992) (holding that property rights are defined by the rules or understandings that existed prior to the exercise of police powers being challenged under the Fifth Amendment). Accordingly, subsequent statutory and regulatory mandates have no impact on the validity of contracts that were valid when executed.

Boilerplate clauses such as the "unlawful inaction clause" referenced by Petitioner (*see* Petitioner's Brief ("Pet. Br.") at 28, 31, 35), do not alter this basic rule nor grant the government unilateral authority to modify the contract. Had the government considered reserving the unilateral right to change Respondents' agreements to conform to subsequent legislative or regulatory changes, the government knew exactly how to draft such a clause. In other similar cases involving thrifts, the government had negotiated clauses expressly reserving its right to change the terms of contracts based on changes in the law. *See, e.g., Guaranty Fin. Servs., Inc. v. Ryan,* 928 F.2d 994, 999 (11th Cir. 1991). That language does not appear in Respondents' contracts and the language of the unlawful inaction clause cannot fill the void.

To apply the unlawful inaction clause using a subsequently enacted law would be to authorize retroactive legislation. Retroactive legislation is legislation "which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past . . . ." *See Landgraf*

v. USI Film Prods., 114 S. Ct. 1483, 1499 & n.23 (1994) (quoting *Society for Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756 (C.C.D.N.H. 1814) (No. 13,156) (citations omitted)). This Court generally has applied a presumption against retroactive effects for statutes, especially statutory provisions affecting contract or property rights. *Landgraf*, 114 S. Ct. at 1499-1500 & n.25. This presumption against statutory retroactivity supports the "'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place . . . .'" *Id.* at 1497 (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring)).

Holding that Respondents' contract rights remained valid does not require this Court to place limits on Congress' ability to legislate. Respondents have never challenged Congress' authority to pass legislation which impacts contract or property rights. The issue to be determined is whether the government may pass such legislation compensating the affected parties.

There are three categories of cases relating to the impact of legislation on existing contracts: (1) cases where a party who is *not* in a contractual relationship with the government commences business in a regulated field which is subsequently affected by legislation, *see, e.g., Bowen v. Public Agencies Opposed to Social Sec. Entrapment* ("*POSSE*"), 477 U.S. 41 (1986); *Federal Housing Admin. v. Darlington, Inc.*, 358 U.S. 84 (1958); (2) cases involving contracts between private parties that are affected by subsequent legislation, *see, e.g., Norman v. Baltimore & O.R.R.*, 294 U.S. 240 (1935); and (3) cases involving valid contract rights between the government and another party that are subsequently affected by legislation, *see, e.g., Lynch v. United States*, 292 U.S. 571, 580 (1934); *Perry v. United States*, 294 U.S. 330, 351 (1935). Respondents' contracts fall into the third category of cases: when a private party acquires valid contract rights in a contract with the government, those rights survive subsequent legislation altering the government's contracting authority.

The first category of cases distinguishes between *expectations* that parties have because of then-existing law and *vested rights* that parties acquire through contract. For example, in *POSSE*, the case upon which the government places its greatest reliance, the Court rejected the contention that California's right of withdrawal from the federal social security system constituted property within the meaning of the Fifth Amendment. Although the parties had entered into an "agreement" that allowed California to unilaterally withdraw from the social security system, the Court held that the agreement merely restated the statutory language of the Social Security Act and conferred no vested right upon which California could assert a property interest. Congress, therefore, could enact legislation revoking states' then-existing rights to withdraw from the system without such actions constituting a taking under the Fifth Amendment. *POSSE*, 477 U.S. at 55.[2] *See also Darlington*, 358 U.S. at 91 (holding that under National Housing Act party did not possess "even a semblance of a contractual right rising to the dignity of the one involved in *Lynch*"). Unlike Respondents here, the parties in *POSSE* and *Darlington* did not possess vested contract rights as against the government, and thus, were vulnerable to regulatory changes.

The second category of cases involves contracts between private parties affected by subsequent legislation. Although the government does not make reference to these cases, it borrows a proposition cited often in cases of this type: contracts cannot impair the ability of Con-

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[2] Significantly, unlike here, the Social Security Act expressly reserved to Congress the authority to alter not only its provisions, but any agreements entered into pursuant to the Act. *POSSE*, 477 U.S. at 51-52; *see* 42 U.S.C. § 1304 (1994) ("The right to alter, amend, or repeal any provision of this chapter is hereby reserved to the Congress.").

gress to legislate. (*See* Pet. Br. at 18.) While true, this proposition is anchored in cases involving contracts between *private* parties. For example, in *Norman*, Congress outlawed "gold clause" stipulations in all public and private contracts in order to regulate the currency of the United States. 294 U.S. at 311. In holding that Congress could invalidate provisions of existing contracts between private parties, the Court stated that "[p]arties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them." *Id.* at 308. However, the Court also stated that "[t]he Government's own contracts—the obligations of the United States—are in a distinct category and demand separate consideration. *See Perry v. United States*, decided this day." *Id.* at 306 (citation omitted).

Respondents' situation fits within the third category of cases illustrated by *Perry* and *Lynch*: valid contracts between the government and private parties that are subsequently affected by an act of Congress. As in *Norman*, the plaintiff in *Perry* contested Congress' nullification of the "gold clause" in all obligations. In *Perry*, however, the plaintiff possessed an obligation of the United States. The Court, noting this distinction, held that Congress could not abrogate an obligation of the government entered prior to the act of Congress:

> There is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of the Congress to alter or repudiate the substance of its own engagements when it has borrowed money under the authority which the Constitution confers.

Perry, 294 U.S. at 350-51. The Court recognized that if Congress has the ability to nullify already-existing obligations of the United States, a promise of the government would become nothing more than an "illusory pledge." *Id.* at 350; *see also Murray v. Charleston*, 96 U.S. 432, 445 (1877) ("It is against the rules, both of law and of reason, to admit by implication in the construction of a contract a principle which goes in destruction of it.").

In *Lynch*, the Court made clear the distinction between (1) rights created by contract, and (2) gratuities or privileges bestowed through acts of Congress. *Lynch* involved beneficiaries under war risk insurance policies issued by the United States during the First World War. The United States refused to make payments under the policies, arguing that an act of Congress had repudiated all laws pertaining to war risk insurance, including the right of beneficiaries to claim amounts due under the policies. The Court rejected the government's position, holding that the war risk insurance policies, as *contracts* with the United States, possessed fundamentally different legal incidents than *benefits* granted by Congress:

> Pensions, compensation allowances and privileges are gratuities. They involve no agreement of parties; and the grant of them creates no vested right. The benefits conferred by gratuities may be redistributed or withdrawn at any time in the discretion of Congress. On the other hand War Risk policies, being contracts, are property and create vested rights. The terms of these contracts are to be found in part in the policy, in part in the statutes under which they are issued and the regulations promulgated thereunder.

Lynch, 292 U.S. at 577 (citations omitted). Significantly, as in *Perry*, the Court noted that the act authorizing the issuance of the policies, did not reserve to Congress the right to curtail the amount of benefits which the government had contracted to pay. *Id.* at 578.

Respondents here do not dispute the government's revocation of benefits or gratuities granted to them by Congress as part of a regulatory scheme. Rather, they seek the consideration, *i.e.*, the payment, promised to them in exchange for acquiring failing thrifts. To allow Congress to abrogate Respondents' valid contract rights

would run counter to the principle that "[t]he United States are as much bound by their contracts as are individuals." *Sinking-Fund Cases*, 99 U.S. 700, 719 (1879); *see Lynch*, 292 U.S. at 580 ("Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation.").

C. The Power To Legislate Does Not Include The Power To Destroy Vested Contract Rights

To avoid liability, the government relies upon the "unmistakability" and sovereign act doctrines. Neither excuse, however, shields the government from liability for the destruction of Respondents' vested rights.

1. *The Right To Terminate A Contract Due To A Change In Government Circumstances Must Be Specifically Reserved*

Throughout its history, the United States government has had the need to abrogate or terminate its contracts with private parties due to a change in circumstances. The issue is not whether the government can act in such a manner, but, rather, what are the consequences of such action. The rule of law is well-developed. Absent a contractual or statutory mechanism for compensating parties upon termination of their contracts, termination will constitute a breach. *See United States v. Spearin*, 248 U.S. 132, 138 (1918); *United States v. Behan*, 110 U.S. 338, 346-57 (1884); Beauregard, *Termination for Convenience as Breach of a Government Contract*, 7 B.C. Indus. & Com. L. Rev. 259 (1966) (recognizing that United States has "inherent and sovereign power to terminate a government contract;" in absence of statutory, regulatory or contractual basis such action considered breach of contract).

One of the most common historical examples of the government's abrogation of contracts due to changed circumstances are those contract terminations that occurred at the cessation of hostilities. Beginning with the Civil War, when the government terminated a contract that did not contain a termination clause, it was required to compensate the contractors for breach. In *United States v. Speed*, 75 U.S. (8 Wall.) 77 (1868), the government abrogated a contract for the packing and curing of pork for use as military provisions due to an increase in the price of hogs. This Court held that the government had breached its contract, had failed to include a termination clause which would have limited its damages, and therefore owed the contractors damages, including lost profits. The damages awarded were those permitted under the common law for breach of contract, without limitation.

In *Thompson v. United States*, 9 Ct. Cl. 187 (1873), the government entered into a contract for mules just prior to the end of the Civil War. At the end of the war, the government realized that it had a surplus of mules and ordered the contractors to stop shipment. Due to a surplus of mules on the open market, the contractors were unable to sell the mules for the amount the government had agreed to pay. The Court of Claims found a breach of contract and awarded the contractors the difference between the average sale price to the government and the amount for which the contractors were able to sell the surplus mules.

By the First World War, the government had a better sense of the perils of contract terminations due to the end of war. Thus, Congress passed various laws which established a mechanism to allow the government to terminate contracts without incurring liability for breach of contract. For example, the Urgent Deficiencies Appropriations Act empowered the President to cancel, suspend or requisition any contract so long as the government pro-

vided "just compensation" to the contractor whose contract rights were taken. 40 Stat. 182 (1917), *repealed by* Act of June 5, 1920, ch. 250, 41 Stat. 988. Absent this statutory authorization, the government would have been liable for breach of contract when it canceled contracts following the war.[3]

By the Second World War, the government had had extensive experience with contract abrogations due to changed circumstances and recognized the need to reserve the right to terminate contracts without incurring liability for breach of contract. Under the First War Powers Act, Pub. L. No. 77-354, 55 Stat. 828 (1941), Congress authorized the President to enter into contracts, as well as modify or amend contracts. The Attorney General determined that the Act permitted settlement of termination claims by negotiation. 40 Op. Att'y Gen. 53 (1942). Two years later, Congress passed the Contract Settlement Act of 1944, ch. 358, 58 Stat. 649 (principally codified as amended at 41 U.S.C. §§ 101-125 (1994)), which permitted cancellation of a contract upon payment of "fair compensation" to include the contractor's costs incurred in the terminated portion of the contract plus a reasonable amount for profit thereon. *See* Office of Contract Settlement, *A History of War Contract Terminations and Settlements*, 21-28 (July 1947).

By the end of World War II, recognizing that it could not avoid liability for terminating contracts, the United

[3] Congress, while limiting a contractor's right to recovery for abrogation of its contract, recognized that in doing so, it had taken vested rights for which it would have to provide just compensation. *See International Arms & Fuze Co. v. United States*, 101 Ct. Cl. 297 (1944) (stating that Urgent Deficiencies Appropriations Act was "a species of eminent domain," and termination of contracts under Act "was not a breach of contract by the Government, but was a taking, for the public benefit, of the contractor's rights under the contract"); *see also De Laval Steam Turbine Co. v. United States*, 284 U.S. 61 (1931); *Barrett Co. v. United States*, 273 U.S. 227 (1927); *Russell Motor Car Co. v. United States*, 261 U.S. 514 (1923).

States established mechanisms to process termination claims. These mechanisms have evolved into the termination for convenience clause that is required currently in government procurement contracts under the Federal Acquisition Regulations. *See G.L. Christian & Assocs. v. United States*, 312 F.2d 418, 426 (Ct. Cl.), *cert. denied*, 375 U.S. 954 (1963).

The history of war contract terminations demonstrates that the government must reserve the right to limit its obligations under terminated contracts by statute, regulation or contract. If the government fails to do so, it will be liable for a breach of contract or for a taking of vested rights.[4]

2. *The "Unmistakability Doctrine" Does Not Protect Against Abrogation Of Vested Rights*

The government's reliance on the concept it calls the "unmistakability doctrine" confuses the issues before the Court. Respondents here do not claim that their contracts prevented Congress from subsequently altering the regulatory framework concerning supervisory goodwill; nor do they assert that FSLIC and the FHLBB could preclude Congress from legislating. Rather, Respondents argue that Congress' withdrawal of FSLIC's authority to enter into contracts regarding the treatment of goodwill has abrogated their valid, pre-existing contract rights. The unmistakable terms requirement does not apply to this claim.

The roots of the unmistakable terms requirement can be found in cases where a party who is a recipient of a statutory benefit attempts to enjoin the use of the inherent powers of the sovereign. For more than 100 years, this

[4] When faced with both a breach of contract and a taking of vested rights, recovery on the contract theory generally precludes recovery under the Fifth Amendment. *Sun Oil Co. v. United States*, 572 F.2d 786, 818 (Ct. Cl. 1978) (stating when plaintiff bases alternative theories in contract and Fifth Amendment recovery under one precludes the other).

Court has distinguished cases involving statutory benefits from cases involving contractual rights. For example, where a party sought to prevent the state of Rhode Island from imposing a tax on banks, the Supreme Court found that where there was no express or implied promise to tax the bank "[t]he relinquishment of such a power is never to be assumed." *Providence Bank v. Billings*, 29 U.S. (4 Pet.) 514, 561 (1830). Therefore, the tax was upheld. *Id.*

In contrast, in *Jefferson Branch Bank v. Skelly*, 66 U.S. (1 Black) 436 (1861). a bank was successful in enjoining the taxing power of the state. The Court stated that no surrender of any power of sovereignty is effective "unless such surrender has been expressed in terms too plain to be mistaken." *Id.* at 446. In *Jefferson*, the Court held that the charter granted to the bank which explicitly stated that the state would accept a certain percentage of dividends in lieu of any tax to which the bank might otherwise be subject was a contract. Subsequent legislation which increased taxes on the bank was deemed a violation of the contract. Therefore, the bank was not subject to the additional tax. The Court's analysis of whether the government had waived its right to tax the bank depended on the determination that the bank had obtained a valid contract right.[5]

This ancient distinction between gratuitous benefits and vested contract rights was recently restated by the U.S.

[5] Where the relief sought is an injunction against the sovereign's authority to legislate, heightened scrutiny is required to protect the powers of the sovereign. It is in this context that courts have required a showing that the government has expressed its intention to waive its sovereign power to legislate in unmistakable terms. *See Providence*, 29 U.S. at 560. The whole community has an interest in maintaining the sovereign power intact as against individuals; therefore, this Court has understandably been very cautious in finding that the government has contracted to relinquish its powers. *See Jefferson*, 66 U.S. at 447-48; *see also Providence*, 29 U.S. at 561.

Court of Appeals for the Federal Circuit in *Hughes Communications Galaxy, Inc. v. United States*, 998 F.2d 953 (Fed. Cir. 1993) and *American Satellite Co. v. United States*, 998 F.2d 950 (Fed. Cir. 1993). Both *Hughes* and *American Satellite* involved contracts between private parties and the National Aeronautics and Space Administration ("NASA") under which NASA was to use its best efforts to provide launch services via the space shuttle program. The court held that in the face of contract language stating that the contract would be performed in accordance with a specific policy of the United States, the United States could not avoid its contractual obligation by the expedient of changing that policy. *See Hughes*, 998 F.2d at 958; *American Satellite*, 998 F.2d at 952-53. The court found that the reference to the policy in effect on a given date "more than satisfie[d] the 'unmistakable terms' requirement." *Hughes*, 998 F.2d at 958.

Like *Hughes* and *American Satellite*, Respondents' contracts involve specific contractual promises that were negotiated at arm's length. The contracts specified the exact terms under which the parties would operate for an agreed-upon period of time. These terms embodied the consideration paid to the Respondents in lieu of financial assistance. They are unambiguous and must be enforced.

Taken to its extreme, the government's argument illustrates why it is ridiculous to apply the so-called unmistakability doctrine to vested contract rights against the government when a party is seeking damages for the denial of those rights. Under the government's theory, those who contract with the government would be forced not only to negotiate and expressly set forth each and every term of their contracts; they would be required to anticipate all potential changes in the law which would have an impact on contract terms and state that each term would survive such a change. This, of course, is

impossible, because Congress could then legislate that material term out of existence thereby rendering every contract with the United States illusory. Moreover, this is not what the law requires. If the government wants to retain the right to modify or terminate a contract, it must state so in the contract. In this sense, it is the right reserved to alter the contract that must be stated in unmistakable terms.

3. *The Sovereign Act Doctrine Has Limited Application*

The sovereign act doctrine protects the government from liability for "public and general" acts taken in its sovereign capacity. *Horowitz v. United States*, 267 U.S. 458, 461 (1925). In order for the sovereign act doctrine to apply, the act must be in the public interest and must be of general, not specific, application. *Air Terminal Servs., Inc. v. United States*, 330 F.2d 974, 981 (Ct. Cl. 1964) (Jones, C.J., dissenting). But, "[a]cts that are motivated primarily by a desire to save money do not provide a defense [under the doctrine]." *Hughes Communications Galaxy, Inc. v. United States*, 26 Cl. Ct. 123, 141 (1992), *rev'd on other grounds*, 998 F.2d 953 (Fed. Cir. 1993); *accord Freedman v. United States*, 320 F.2d 359 (Ct. Cl. 1963).

The legislative history of FIRREA bears out the lower courts' findings that FIRREA targeted the contracts at bar. It is replete with statements of concern for the public fisc. *See, e.g.*, H.R. Rep. No. 54(V), 101st Cong., 1st Sess. 24-25 (1989), *reprinted in* 1989 U.S.C.C.A.N. 397, 407-09; 135 Cong. Rec. H2565 (daily ed. June 14, 1989) (statement of Rep. Saxton that goodwill agreements were "a mistake"); *Guaranty Fin. Servs.*, 928 F.2d at 1004-06 (providing discussion on purpose of FIRREA, congressional targeting of forbearance agreements). *See also Winstar Corp. v. United States*, 64 F.3d 1531, 1550 (Fed. Cir. 1995) (discussing congressional knowledge of

FIRREA's breach of the contracts), *cert. granted*, 133 L. Ed. 2d 753 (1996). The legislative history demonstrates that Congress was unhappy with the terms of the contracts it had entered and sought to escape these terms through legislation. The government may not claim the protection granted the sovereign when it is using its position as sovereign to breach its own contract.

Even if the enactment of FIRREA is found to constitute a sovereign act, that finding does not foreclose government liability. The fact that liability is triggered by a sovereign act is irrelevant to the issue of compensation. *Hughes*, 998 F.2d at 959. When a contract with the government contains a clear promise to act or refrain from acting, breach of the promise by a sovereign act is compensable. Peter S. Latham, *The Sovereign Act Doctrine in the Law of Government Contracts: A Critique and Analysis*, 7 U. Tol. L. Rev. 29, 44-45 (1975) (discussing specificity of government promise and citing cases). The promise to act or refrain from acting may be either express or implied. *Id.* at 41; *see, e.g., Gerhardt F. Meyne Co. v. United States*, 76 F. Supp. 811 (Ct. Cl. 1948) (warranty when contract stated specific road available for use, however, military had closed road); *D & L Constr. Co. v. United States*, 402 F.2d 990 (Ct. Cl. 1968) (when contract specified means of egress, it warranted access). It does not have to be stated in unmistakable terms.

All three contracts at issue involve agreements which contained express, unconditional language on the accounting treatment of goodwill. *Cf. Guaranty Fin. Servs.*, 928 F.2d at 999 (agreement warned that obligations of parties might change with subsequent changes to regulations). When Congress passed FIRREA, it precluded such treatment of supervisory goodwill. Having done so, the government has breached an express promise to act in a certain way. It, therefore, must pay for its breach. *United States v. Bostwick*, 94 U.S. (4 Otto) 53, 69 (1876) (govern-

ment lease of premises contained implied promise to remunerate for damages to building); *Sunswick Corp. v. United States*, 75 F. Supp. 221 (Ct. Cl.), *cert. denied*, 334 U.S. 827 (1948) (directive to contractor requiring wage rates higher than those specified in contract was compensable because action deprived contractor of specific contractual promise).[6]

The government's conduct is analogous to accepting delivery of airplanes or ships ordered during a war and refusing to pay because the war ended the day after delivery. It forces Respondents—thrifts that were not part of the savings and loan crisis, but that responded to the government's call to fix the problem—to assume the public burden of Congress' misjudgment. Respondents must be compensated for the destruction of the rights they acquired in consideration for their assumption of this burden.

II. CITIZENS MUST BE COMPENSATED FOR THE DESTRUCTION OF VESTED RIGHTS

Courts have long recognized that the government cannot unilaterally abrogate its contracts with private parties without the payment of compensation. A variety of common law theories and constitutional principles protect those who possess valid contract rights against the United States. Each of these theories requires the government to compensate those with whom it contracts when the government no longer chooses to perform and each is potentially applicable to the government's conduct in this case.

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[6] Even if this Court does not find that a "compensable" sovereign act exists, the contractors are not foreclosed from recovery. The sovereign act doctrine does not immunize the government from its duty to provide just compensation under the Fifth Amendment. *See Wah Chang Corp. v. United States*, 282 F.2d 728 (Ct. Cl. 1960) (sovereign act that effects taking of property is compensable); *Seatrain Lines, Inc. v. United States*, 99 Ct. Cl. 272, 315 (1943) (every breach of contract by government also implicates taking of vested rights protected under Fifth Amendment).

A. Breach Of Contract Provides Compensation For The Denial Of Vested Contract Rights

When the federal government enters into contracts, it ordinarily possesses rights and incurs responsibilities similar to those of a private person who is a party to the contract. *Perry*, 294 U.S. at 352 ("There is no difference . . . except that the United States cannot be sued without its consent.") (citation omitted). One such responsibility of the government as a contracting party is to provide compensation for breach of vested contract rights. If the United States repudiates its contractual obligations "it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen." *Sinking-Fund Cases*, 99 U.S. at 719. As a result, when the United States breaches a contract the non-breaching party is entitled to the damages and remedies afforded by the common law.

The underlying purpose in awarding breach of contract damages is to "place the injured party in as good a position as he or she would have been had the breaching party fully performed." *Estate of Berg v. United States*, 687 F.2d 377, 379 (Ct. Cl. 1982); *accord Restatement (Second) of Contracts* § 344(a) (1981) (these are damages which protect a non-breaching party's "expectation interest"); McCormick, *Handbook on the Law of Damages* § 137 (1935); W. Jaeger, *Williston on Contracts* § 1338 at 198 (3d ed. 1968). Breach of contract damages include the natural and probable consequences of the breach. *Ramsey v. United States*, 101 F. Supp. 353, 357 (Ct. Cl. 1951), *cert. denied*, 343 U.S. 977 (1952); *accord* W. Jaeger, *Williston on Contracts* § 1344 at 226 (3d ed. 1968). The non-breaching party may also recover special or consequential damages such as lost profits if such damages were reasonably foreseeable at the time the parties entered into the contract. *Id.* at 227-28.

As an alternative to recovery of one's expectation interest, a non-breaching party has the right to damages

based on its "reliance interest," *i.e.*, the "interest in being put in as good a position as he would have been in had the contract not been made." *Restatement (Second) of Contracts* § 344 (1981). Such damages include "expenditures made in preparation for performance or in performance, less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed." *Id.* § 349.

Respondents are entitled to either the expectation measure or the reliance measure of damages for the United States' breach of contract. Under the expectation measure, Respondents are entitled to the full economic benefit that they would have received had the government fully performed. Determination of the full economic benefit must take into account the fact that, if the government had honored its bargain, the thrift owners would have been able to build greater assets with less contributed capital, and achieve earnings through the use of leverage. *See Wells Fargo Bank, N.A. v. United States*, 33 Fed. Cl. 233, 236-37 (1995) (discussion of how financial institutions create earnings through leveraging). Respondents lost this leveraging opportunity and resulting earnings because the thrifts were either forced out of business, or forced to reduce their assets as a result of the government's breach of its agreements.

Alternatively, under the reliance measure of damages, Respondents are entitled to be put in as good a position as they would have been had the contracts not been made. These damages would include, at a minimum, the financial investments that the thrift owners made, initially in reliance on the government's promises, and later to protect themselves after the government breached its promises.

B. A Takings Claim Provides Compensation For Denial Of Any Property Right, Including Vested Contract Rights

1. *The Destruction Of Respondents' Vested Contract Rights By The Enactment Of FIRREA Is A Taking Within The Meaning Of The Fifth Amendment*

Valid contract rights are also protected by the Fifth Amendment. The Just Compensation Clause of the Fifth Amendment "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960); U.S. Const. amend. V. Vested contract rights are property within the meaning of the Fifth Amendment. *Lynch*, 292 U.S. at 579. This Court has found compensable takings not only when the government appropriates a contract, but also where the contract survives but its value is destroyed. *Brooks-Scanlon Corp. v. United States*, 265 U.S. 106 (1924) (appropriation of contract is a taking); *Armstrong*, 364 U.S. at 48 (action rendering valid liens unenforceable satisfies every element of a Fifth Amendment taking).

The determination of whether a taking has occurred is a factual inquiry—the key factor being the extent to which government action has interfered with an individual's reasonable investment-backed expectations. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). For example, in *Ruckelshaus*, Congress amended provisions of a statute that required submission of data containing trade secrets, providing confidentiality and exclusive use of the data by the company who submitted it. 467 U.S. at 992. Congress later amended those provisions again to allow data to be disclosed after a certain time had passed. *Id.* at 994. This Court held that if the agency were to disclose data submitted by Monsanto dur-

ing the time when the statute explicitly guaranteed confidentiality and exclusivity, government disclosure of such data would constitute a taking. *Id.* at 1011.

The Court found that Monsanto had submitted the data in accordance with a statutory scheme under which "the Federal Government had explicitly guaranteed . . . an extensive measure of confidentiality and exclusive use. This explicit governmental guarantee formed the basis of a reasonable investment-backed expectation." *Id.* Even though Monsanto had given no consideration for the protections conferred by the statute, a breach of the government's unilateral promise regarding the treatment of its property was sufficient to constitute a taking.

The instant case presents an even more compelling argument for Fifth Amendment protection. Here, the government's promises were part of a *bilateral* agreement for which Respondents gave consideration. If a statutory scheme which is subject to change at any time is sufficient to establish reasonable investment-backed expectations, then certainly where the government makes specific contractual promises to a private individual, it induces a reasonable expectation that it will fulfill those promises. The destruction of the value of those promises entitles the contractor to compensation under the Fifth Amendment.

2. *Respondents Are Entitled To Compensation To Place Them In The Position They Would Have Been Had The Taking Not Occurred*

In awarding compensation for a Fifth Amendment taking, this Court has sought to put the claimant "in as good a position pecuniarily as if his property had never been taken." *Olson v. United States*, 292 U.S. 246, 255 (1934). Where tangible property is taken, this value is often set at the fair market value of the property at the time of the taking. *United States v. Miller*, 317 U.S. 369, 374 (1943). Under this standard, the owner of the property receives what a "willing buyer would pay in cash to

a willing seller." *Id.* There is no set formula for establishing what amount of compensation is just. *United States v. Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. 396, 402 (1949). Principles of equity must inform the determination. *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950).

Where the government has appropriated an entire contract just compensation has been fixed at the amount a willing buyer would have paid to a willing seller for an assignment of contract rights. *De Laval Steam Turbine Co. v. United States*, 284 U.S. 61, 72 (1931); *Brooks-Scanlon*, 265 U.S. at 123-24. One of the key factors to be considered in fixing this amount is the anticipated profitability of the contract if fully performed. *De Laval*, 284 U.S. at 72.

In the instant case, the government has deprived Respondents of certain rights under their contracts resulting not only in the destruction of the contracts' value, but a loss of the value of Respondents' ongoing business.[7] In these circumstances, Respondents are entitled to recover the value of the businesses that were destroyed. This value may include certain intangibles. *Kimball Laundry Co. v. United States*, 338 U.S. 1, 9-10 (1949). In *Kimball*, the Army took over a laundry for a period of three years. The government reimbursed the owner for the use of the property but refused to compensate the business for the loss of its established customer base. This Court held that the going concern value, although difficult to quantify, was part of what was taken. " 'In determining the value of a business . . . the good will and earning power due to effective organization are often more important elements than tangible property.' " *Id.* at 11 (quoting *Galveston Elec. Co. v. Galveston*, 258 U.S. 388, 396 (1922)).

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[7] Two of the Respondents were immediately thrown into receivership following the passage of FIRREA while the other suffered severe economic hardship, and was unable to enjoy the benefit of the bargain it had struck with the government.

These precedents establish the nature of the reimbursement to which Respondents are entitled. Respondents are entitled to be put in the position they would have occupied had they been allowed to continue using the bargained-for accounting treatments. *See Olson*, 292 U.S. at 255. First, the logical starting point for valuation of Respondents' lost property is the amount that Respondents invested to acquire the thrifts and the amounts they have invested since acquisition in an effort to turn the thrifts into profitable ventures. Second, improvements in the financial position of the thrifts during the time they were operated by Respondents must be added to the initial value at the time of acquisition. Third, the anticipated profitability of the thrifts over the life of the negotiated agreements also made the contract rights more valuable. Finally, Respondents have been stripped of their ability to operate their thrifts, and the going concern value of their businesses now lies in the hands of the government. For taking this intangible property right, the government also must compensate Respondents.

C. Frustration Of Purpose Allows A Citizen To Rescind The Contract And Obtain Restitution

Valid contract rights are also protected under the common law doctrine of frustration of purpose. Under that doctrine, "[a] party may discharge a contract when its primary purpose has been destroyed by a supervening event that the parties assumed would not occur." *Resolution Trust Corp. v. Federal Sav. & Loan Ins. Corp.*, 25 F.3d 1493, 1503 (10th Cir. 1994); *accord Restatement (Second) of Contracts* § 265 (1981); *Everett Plywood Corp. v. United States*, 651 F.2d 723, 728-29 (Ct. Cl. 1981).

The frustration of purpose doctrine is properly applied where subsequent legislation has undermined the fundamental terms of a contract. For example, in *Resolution Trust*, investors in a savings and loan association

claimed that, following the passage of FIRREA, the FDIC and Office of Thrift Supervision had breached the government's contract to treat supervisory goodwill and the value of a subordinated debenture owed to the FSLIC as regulatory capital. The investors sought rescission and restitution.

The United States Court of Appeals for the Tenth Circuit found that the investors were entitled to the requested relief under the doctrine of frustration of purpose. According to the court, "[a]pplication of FIRREA's capitalization requirements to [the new institution] made it impossible for the Investors to fulfill their contract duty to operate the thrift in compliance, thus totally frustrating their purpose and warranting discharge of their agreement to acquire the thrift." 25 F.3d at 1503. The court then upheld the award of restitution of the cash invested at the time of the acquisition.[8]

Remedies for restitution and rescission are not limited to actual investment. The purpose of rescission and restitution is to place a non-breaching party "in as good a position as it enjoyed before the contract was made" by requiring the breaching party to restore the value of the non-breaching party's part performance or reliance. *Resolution Trust Corp.*, 25 F.3d at 1504. Thus, a party whose duty is discharged as a result of frustration of purpose is entitled to restitution for any benefit that it has conferred

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[8] *See also Winstar Corp. v. United States*, 994 F.2d 797, 818 (Fed. Cir. 1993) (Newman, J., dissenting) (when a contract with the government is no longer capable of performance on its agreed terms, whether because of legislative or agency action or Act of God, available relief may include rescission and restitution in cases of impracticability and frustration of contractual purpose), *vacated mem.* No. 92-5614 (Fed Cir. Aug. 18, 1993); *Far W. Fed. Bank, S.B. v. Director, Office of Thrift Supervision*, 787 F. Supp. 952, 960-61 (D. Or. 1992) (thrift's investors were entitled to rescission and restitution under doctrines of frustration of purpose and impossibility of performance where enactment of FIRREA precluded government from honoring agreement).

on the other party by way of part performance or reliance. *Restatement (Second) of Contracts* § 377 (1981); C. Friend, *Actions and Remedies* § 4:23 (1987).

The proper measure of restitution depends on the circumstances of the case. Recovery may be measured as the reasonable value of what the defendant received "in terms of what it would have cost him to obtain it from a person in the claimant's position." *Resolution Trust Corp.*, 25 F.3d at 1505; *Restatement (Second) of Contracts* § 371(a) (1981). The amount may also be measured by the extent to which the defendant's property has increased in value or other interests advanced by the plaintiff's part performance. *Restatement (Second) of Contracts* § 371(b) (1981); *see also* W. Jaeger, *Williston on Contracts* § 1485 at 304-05 (3d ed. 1968) (where party's failure to fulfill completely its contract obligations is due to other party's default, alternative measures of restitution include the amount it would have cost to obtain part performance from other source, or amount by which the defaulting party has been enriched by part performance).

Under these principles, Respondents may be entitled to a wide range of restitutionary damages. First, Respondents are entitled to recoup any investments they made in their institutions. Second, Respondents' recovery may be measured as the reasonable value of what the United States received. A measure of this value is what it would have cost the United States out of the FSLIC insurance fund to bail out the failing thrifts acquired by Respondents, or the cost of inducing another investor to take over the failed thrifts, presumably at a cost considerably higher than Respondents' initial investments.

D. The Public Debt Clause Protects Those Who Have Delivered Services To The United States

Respondents' valid contract rights are protected by the Public Debt Clause of the Fourteenth Amendment. The

Public Debt Clause states that "the validity of the public debt of the United States, authorized by law, . . . shall not be questioned." U.S. Const. amend. XIV, § 4. Respondents have performed the services required under their agreements with the government, thereby establishing a government duty to provide the compensation it promised. The duty to provide compensation is a debt of the United States. The government cannot now question and refuse to honor those debts by the expedient of passing legislation prohibiting their satisfaction.

The Public Debt Clause protects the integrity of all public obligations. *Perry*, 294 U.S. at 354. In *Perry*, the petitioner had purchased a United States bond issued in support of the World War I effort that was payable in gold coin. Congress later passed a resolution declaring that payment in gold coin was against public policy, and therefore, all obligations of the United States would be discharged in legal tender. The resolution significantly reduced the value of the petitioner's bond. *Id.* at 347.

This Court held that in attempting to override the bond obligation, Congress went beyond its power. *Id.* at 354. The Court noted that although the Public Debt Clause was initially inspired by the desire to guarantee the obligations incurred by the government during the Civil War, the language of the clause is not narrowly drawn. *Id.* at 354. Therefore, the Court stated there was no reason not to construe the clause as "embracing whatever concerns the integrity of the public obligations." *Id.* Thus, the clause was found applicable to the World War I obligations in *Perry*.

Respondents, similar to the bondholder in *Perry*, contracted with the government to invest private funds to extinguish public debt. FSLIC "borrowed" these funds from Respondents and in partial "security" for the loans agreed to specific accounting treatments. This investment of private funds to aid the government in dealing with the savings and loan crisis is little different from

the investment made by bond purchasers in support of a war effort. The government is no more free to repudiate its obligations to Respondents than it is to alter the terms of its bond repayment obligations.

Congress may change its regulatory scheme prospectively, but it may not abrogate a party's vested rights against the government. As this Court has stated:

> No one disputes that Congress may prospectively reduce [entitlements] . . . . It is quite a different matter, however, for Congress to deprive [a person] of pay due for services already performed, but still owing. In that case, the congressional action would appear in a different constitutional light.

United States v. Larionoff, 431 U.S. 864, 879 (1977) (citations omitted).

Respondents entered valid contracts with the government under which they invested their own funds. In partial satisfaction of its obligations under the agreements the government pledged to allow Respondents to utilize certain accounting treatments. Respondents satisfied their obligations by acquiring failing thrifts and saving the government hundreds of millions of dollars. Congress later determined that its merger program was not alleviating the thrift crisis and sought to change the regulatory scheme as an alternative approach to easing the government's financial burden. Thus, even though it received the benefit of its bargain, the United States refused to honor its obligations and satisfy the debt established by Respondents' performance. As this Court stated in *Larionoff*, Congress' actions must be evaluated in that light.

Where the government seeks to alter or repudiate its obligations by questioning a public debt, it is liable for breach of contract damages. *Perry*, 294 U.S. at 354. Therefore, in order to be made whole, the government must place Respondents in the position they would have occupied but for the violation of the Public Debt Clause.

They are entitled to receive the benefit of their bargains. In order to be made whole, the government must compensate Respondents for all damages flowing from the failure of the United States to allow Respondents to continue using these accounting treatments, including anticipated profits and the loss of the value of their businesses.

CONCLUSION

For the reasons stated above, the Chamber of Commerce of the United States of America respectfully requests the Court to affirm the decision of the Federal Circuit.

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